80-1984

No.

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ALEXANDE
CL

In the Supreme Court of the United Sta

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER,

vs.

ALFRED ARTUSO, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

WILLIAM L. CAHALAN
Prosecuting Attorney
Wayne County
State of Michigan

EDWARD REILLY WILSON
Principal Attorney, Appeals

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QUESTION PRESENTED

WHERE AGENTS OF THE FEDERAL BUREAU OF INVE
GATION, PURSUANT TO A WHOLLY FEDERAL INVE
GATION, ENGAGE IN CONSENSUAL ELECTRONIC S
VEILLANCE: THAT IS, MAKE AUDIO-VISUAL RECO
INGS OF THE CONSUMMATION OF A CRIME (THE S
OF STOLEN PROPERTY) WHERE THE PURCHAS
PARTY IS AN UNDERCOVER AGENT, THEREBY SATI
ING 18 USC 2510(2)(c), DOES A STATE COURT HOLD
THAT SUCH RECORDING IS UNLAWFUL AS VIOLAT
THE STATE CONSTITUTION, RENDERING THE RECO
INGS INADMISSIBLE IN STATE COURT, CONFL
SQUARELY WITH 18 USC 2517(3) AND CONSEQUEN
VIOLATE THE SUPREMACY CLAUSE OF THE UNI
STATES CONSTITUTION?

TABLE OF CONTENTS

Question Presented . . . . .
Index of Authorities . . . . .
Opinions Below . . . . .
Statement of Jurisdiction . . . . .
Constitutional Provisions and Statutes Involved . . . . .
Statement of Facts . . . . .
Reasons for Granting the Writ . . . . .
Consensual and Non-Consensual Electronic Surveillance . . . . .
Conclusion . . . . .
Appendix A . . . . .
Appendix B . . . . .
Appendix C . . . . .

INDEX OF AUTHORITIES

CASES

Commonwealth v *Vitello*, 327 NE 2d 819 (1975) .
People v *Conklin*, 522 P2d 1049 (Cal, 1974) ....
United States v *Hall*, 543 F2d 1229 (1976) .....
United States v *Horton*, 601 F2d 319 (1979).....
United States v *Marion*, 535 F2d 697 (1976).....
United States v *Nelligan*, 573 F2d 251 (1978)....
United States v *White*, 401 US 745 (1971) .....

OTHER AUTHORITIES

28 USC 1257(3) .....
18 USC § 2510(2)(c) .....
18 USC § 2517(3) .....
18 USC § 2516(2) .....

No.

In the Supreme Court of the United

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THE PEOPLE OF THE STATE OF MICHIGAN, PETI

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ALFRED ARTUSO, RESPONDENT.

PETITION FOR A WRIT OF CERTIO
TO THE COURT OF APPEALS OF T
STATE OF MICHIGAN

NOW COME the People of the State of Mic
WILLIAM L. CAHALAN, Prosecuting Attorney for
ty of Wayne; EDWARD REILLY WILSON, Prin
torney, Appeals; and TIMOTHY A. BAUGHMAN,
Prosecuting Attorney, and prays that a writ of certi
to review the judgment of the Court of Appeals of th
Michigan entered in the above-entitled cause on O
1980, rehearing denied by the Court of Appeals on N
13, 1980, and leave to appeal denied by the
Supreme Court on April 13, 1981 (three justices di

OPINIONS BELOW

The opinion of the Michigan Court of Appeal
at 100 Mich App 398; ____ NW 2d ____ (198(
pended as Appendix A. The Michigan Court
order denying rehearing is appended as Apper
order of the Michigan Supreme Court denying lea
is appended as Appendix C.

STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appea
October 6, 1980, and rehearing was denied on N
1980. The Michigan Supreme Court denied lea
on April 13, 1981. The jurisdiction of this cou
under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS A
STATUTES INVOLVED

Article 6, clause 2 of the United States Const
in pertinent part:

> This Constitution, and the laws of the Unit
> which shall be made in pursuance thereof
> be the supreme law of the land; and the
> every state shall be bound thereby, anythi
> constitution or laws of any state to the cont
> withstanding.

18 USC § 2510(2)(c) provides that:

> It shall not be unlawful under this chapter
> son acting under color of law to intercept
> oral communication, where such person
> to the communication, or one of the par
> communication has given prior consent t
> terception.

18 USC § 2517(3) provides that:

> Any person who has received, by any mea
> ized by this chapter, any information co
> wire or oral communication, or eviden
> therefrom intercepted in accordance with
> sions of this chapter may disclose the c
> that communication or such derivativ
> while giving testimony under oath or affi
> any proceedings held under the autho
> United States or of any state or political
> thereof.

STATEMENT OF FACTS

The FBI in this case was operating a s
operation. The FBI had rented a front office
so that it appeared that the operation contr
warehouse. The supposed business was k
Distributors, Inc., located in Taylor, Michig
FBI Agent Thomas Cupples portrayed him
fence, calling himself Thomas Kelley.

Agent Cupples and an agent named Fassa
duced by a state police detective to an inform
Robinson, who arranged a meeting between
defendant Al Artuso (R-283). After it was esta
agents were fences of stolen property Artuso
he had a stolen flat bed trailer he wanted to s
trailer had been stolen six months earlier in
Artuso said he would sell it for $1,500.00 (R

Subsequently the agents met with Artuso a
Taylor to arrange to see the trailer and rea
(R-309). This was done (R-310-314; 316).
that payment would occur at the FBI Iowa
fice, which was equipped with audio and

equipment with the express approval of the A
of the United States (R-320-333, 304). The c
the crime was taped, both audio and vide
played to the jury (335). Defendant was conv
of receiving and concealing stolen property
$100.00.

On October 6, 1980, the Court of Appeals
viction, because the FBI agents had not ob
before taping the crime, and had theref
Michigan Constitution. Rehearing was deni
13, 1980. The Michigan Supreme Court de
peal on April 13, 1981, 3 of 7 justices disse

REASONS FOR GRANTING THI

The Michigan Court of Appeals has hel
made by FBI agents in compliance with t
Constitution and federal law (and therefor
federal prosecution) are violative of the M
tion and thus inadmissible in state prosec
submits that this holding is in conflict wit
Clause of the United States Constitution.

Article 6, Clause 2 of the United States C
in pertinent part:

> This Constitution, and the laws of the
> which shall be made in pursuance the
> be the supreme law of the land; and
> every state shall be bound thereby, an
> constitution or laws of any state to the
> withstanding.

18 USC § 2510(2)(c) provides that:

> It shall not be unlawful under this cha
> son acting under color of law to inter

oral communication, where such pe
to the communication, or one of th
communication has given prior cons
terception.

18 USC § 2517(3) further provides tha

Any person who has received, by any
ized by this chapter, any informatio
wire or oral communication, or ev
therefrom intercepted in accordance
sions of this chapter *may disclose t*
that communication or such deriv
while giving testimony under oath or
any proceeding held under the autho
ted States *or of any state or politi*
thereof. (emphasis added)

The agents' conduct in this case was co
under *United States* v *White*, 401 U
authorized by 18 USC § 2510(2)(c). Sinc
was in compliance with Title III, their
recordings were admissible in state cou
2517(3). 18 USC § 2517 (3) provides
disclose the contents of lawfully intercep
any derivative evidence while testifying
Michigan Court of Appeals has held tha
under the Supremacy Clause, 18 USC § 2
"the judges in every state" notwithstandi
the contrary in the state constitution.

CONSENSUAL AND NON-CON
ELECTRONIC SURVEILL

Of course, it may be argued that state
more stringent requirements for electron
does Title III. Indeed, while it is clear t

impose more stringent requirements
federal prosecutions, see e.g., *United*
1229 (1976); *United States* v *Nelligan*,
United States v *Horton*, 601 F2d 319 (1
for the proposition that state law *can*
dards than Title III to govern state offic
tions. See *Hall supra; United States* v
(1976); *People* v *Conklin*, 522 P2d 1
monwealth v *Vitello*, 327 NE 2d 819 (
however, is *not* inconsistent with petitio
Court of Appeals' ruling in this case v
Clause.

There are, as it were, *two* sorts of
covered by Title III: First, what might
surveillance (18 USC § 2510(2)(c)) w
judicial authorization; and second, *n*
lance, which does require judicial au
ficers may not engage in non-consens
the prosecuting attorney of the approp
sion "is authorized by a statute of that
tion to the state court judge of compe
order authorizing or approving the i
oral communications. . . ." 18 USC §
compliance with Title III is *condition*
state-enabling legislation, that legislati
than Title III itself, and there need be
tion *only* in the area of non-consensua
in *Hall, supra*:

> To the extent that there is a co
> state and federal legislation . . .
> controls under the Supremacy C
> stitution . . . *The state law ca*
> *federal unless the federal act itsel*
> *plication of state standards.* 548
> phasis added)

Title III *only* sanctions the applicati
the area of non-consensual surveillar
with state standards is a prerequisit
compliance with Title III. *Not so*
lance. Such surveillance is lawful
regard to state law, and the results a
under 18 USC § 2517(3). The Mic
holding to the contrary violates the S
United States Constitution. Michiga
FBI agents violated defendant's
rights consistent with its fealty to the
tion. Congress had pre-empted the fi
ing. *See Hall, supra*.

CONCLUSIO

It is respectfully submitted th
Michigan Court of Appeals conflic
Clause of the United States Const
review should be granted.

Respec

WILLI
Prosecu

EDWA
Princip

TIMOT
Assista
12th F
Detroit
Phone

Dated: April 30, 1981

APPENDIC

or participant monitoring of conversations as a matter of Federal constitutional law.

He would hold that participant recording should not be held to require a search warrant under the Michigan Constitution.

OPINION OF THE COURT

1. SEARCHES AND SEIZURES – SEARCH WARRANTS – RECORDING TRANSACTIONS.

A search warrant is required where the police record a transaction with a defendant.

2. EVIDENCE – CRIMINAL LAW – SIMILAR ACTS – ADMISSIBILITY.

Evidence of similar acts, to be admissible in a criminal prosecution, must be probative of defendant's motive, scheme, plan, system, intent or absence of mistake or accident on his part in doing the act; furthermore, defendant's motive,

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REFERENCES FOR POINTS IN HEADNOTES

[1] 68 Am Jur 2d, Searches and Seizures § 36.

[2] 29 Am Jur 2d, Evidence § 320 et seq.

Admissibility under Rule 404(b) of the Federal Rules of Evidence, or evidence of other crimes, wrongs, or acts similar to offense charged to show preparation or plan. 47 ALR Fed 781.

[3] 29 Am Jur 2d, Evidence § 156.

Instructing on burden of proof as to defense of entrapment in federal criminal case. 28 ALR Fed 767.

[4, 7] 68 Am Jur 2d, Searches and Seizures § 46.

[5, 6] 68 Am Jur 2d, Searches and Seizures § 24.

scheme, plan, system or absence of mistake or accident m
be a issue.

3. CRIMINAL LAW – ENTRAPMENT – OBJECTI
TEST – BURDEN OF PROOF.

Michigan has adopted the objective test for entrapm
which focuses solely on police conduct rather than on the
dividual defendant's predisposition to commit the offense
successful claim of entrapment must be proved by a prepo
derance of the evidence.

4. CONSTITUTIONAL LAW – SEARCHES A
SEIZURES – CONVERSATIONS – PARTICIPANT R
CORDING – PARTICIPANT MONITORING – AMEN
MENTS.

Search warrants are not required for participant recordi
or participant monitoring of conversations as a matter
Federal constitutional law (US Const, Ams IV, XIV).

5. CONSTITUTIONAL LAW – SEARCHES A
SEIZURES – CONVERSATIONS – PARTICIPANT MO
TORING – ELECTRONIC DEVICE TRANSMISSIONS
SEARCH WARRANTS.

Participant monitoring of a conversation through the
of an electronic device to transmit the exchange of words t
third party requires a search warrant to satisfy the consti
tional provisions governing searches and seizures in Michig
(Const 1963, art 1, § 11).

6. SEARCHES AND SEIZURES – CONVERSATIONS
RIGHT OF PRIVACY – PARTICIPANT MONITORING
PARTICIPANT RECORDINGS – DEFINITIONS.

Participant recording is distinguishable from particip
monitoring: participant monitoring involves simultane

transmissions to third parties wherein the participant in
conversation has no control other than to turn off th
monitor, everything and anything is automatically an
simultaneously disclosed to the uninvited third ear and this
the feature of participant monitoring which makes it pa
ticularly offensive; participant recording, on the other han
does not involve these same concerns, there is no simultaneo
disclosure to third parties, the recording merely preserves t
conversation in a more reliable form and any disclosu
made will be because the participant decided to make the
after hearing the conversation.

7. CONSTITUTIONAL LAW – SEARCHES AN
SEIZURES – PARTICIPANT RECORDING.

Participant recording should not be held to required
search warrant under the Michgan Constitution.

FRANK J. KELLEY, ATTORNEY GENERAL, ROBERT
DERENGOSKI, SOLICITOR GENERAL, WILLIAM
CAHALAN, PROSECUTING ATTORNEY, APPEALS, A
DIANNE M. ODROBINA, ASSISTANT PROSECUTING A
TORNEY, for the people.

William R. Stackpoole, for defendant.

Before: Bashara, P.J., and D.C. Riley and E.A. Quinne
JJ.

D.C. Riley, J. Convicted by a jury of receiving and conc
ing stolen property over the value of $100, contrary to M
750.535; MSA 28.803, and sentenced to serve two and
half to five years in prison, defendant appeals raising th
issues which we consider seriatim.

Prior to trial, defendant moved to suppress evidence
tained by FBI agents by means of electronic eavesdrop
devices. The pretrial evidentiary hearing reveals that Fe

agents were running a bogus fencing operation out
warehouse in Taylor, in which they had installed a hi
audio and video recording equipment. The agents were
tacted by members of the Michigan State Police who inf
ed them that there was an individual who would introduc
agents to defendant, who had allegedly been selling s
merchandise. Shortly thereafter, a meeting was arrange
tween the informant, Robinson, the defendant and
agents, at which time defendant disclosed that he had a
to stolen property, including a flatbed trailer. A price
agreed upon and the following day defendant met wit
agent to discuss the details. Soon after, defendant met
the agents at the warehouse and advised them that he
dropped off the trailer. The audio and video tape m
anisms recorded defendant receiving $1,300 and infor
the agents that he could deliver stolen meat as well as D
pickup trucks.

The trial court denied defendant's motion to suppress
defendant's objection that no warrant permitting
monitoring was issued, and the tape was played to the

In *People* v *Beavers*, 393 Mich 554; 227 NW2d 511 (1
the Supreme Court held that a participant to a convers
could not electronically monitor a conversation whi
transmitted to law enforcement officers unless specif
authorized to do so by a search warrant. *Beavers* specif
declined to consider conversations which a participant s
preserves for later dissemination:

"We do not address those situations which include a
ticipant himself recording the conversation or the use
electronic device by a third party only to eavesdrop u
conversation between two parties, one of whom is coope
with the authorities." (Emphasis in original.) *Beavers*, s
562-563, fn 2.

Relying on *People* v *Livingston*, 64 Mich App 2
NW2d 63 (1975), this Court extended the rationale of
in *People* v *Taylor*, 93 Mich App 292; 287 NW2d 210
People v *Perry*, 91 Mich App 79, 80; 282 NW2d 14
and *People* v *Hall*, 88 Mich App 324; 276 NW2d 897
holding that the police violate the warrant requirer
failing to procure a warrant prior to recording a conv
that a participant simply preserves for later dissem
Admittedly, one panel has refused to extend the sea
rant requirement to participant monitoring. See *
Dubose, 91 Mich App 633; 283 NW2d 644 (1977).[1] H
we are persuaded that the better reasoned analyses w
adopt today is set forth in *People* v *Perry, supra*.

"The intrusion of privacy incurred where a par
transmits a conversation to a third party is equally pr
where a participant records the conversation. Thus
dant is entitled to the same protection from unrea
searches and seizures."

Since no search warrant was procured in this cas
reversible error to play the tape recordings to the jury

Defendant further asserts that the trial court erre
mitting evidence of similar acts committed by the de
The audio portion of the video tape contained state
the defendant that he could deliver other stolen merc
Defendant contends he never placed his intent, m
scheme in issue and that, therefore, this evidence w

---

[1] The author wishes to acknowledge her former position
v *Dubose*. Having met this issue subsequently in *Peopl
supra*, however, she is convinced that the rationale in
Beavers, supra, is applicable to the fact situation herei

missible. MCL 768.27; MSA 28.1050 allows si
testimony to be admitted under certain limite
stances:[2]

"In any criminal case where the defendant's moti
the absence of, mistake or accident on his part, or
dant's scheme, plan or system in doing an act, is ma
like acts or other acts of the defendant which ma
show his motive, intent, the absence of, mistake o
on his part, or the defendant's scheme, plan or sys
ing the act, in question, may be proved, whether th
temporaneous with or prior or subsequent the
withstanding that such proof may show or tend t
commission of another or prior or subsequent cri
defendant."

In *People* v *Major*, 407 Mich 394; 285 NW2d 6
the Supreme Court enunciated standards for admi
evidence of similar acts. To be admissible, the evid
be probative of either the statutory or judicial pu
this purpose must be material or "at issue" in the ca
supra, 399. Defense counsel placed defendant's int
during opening statement by maintaining defe

---

[2] See also MRE 404(b), effective March 1, 1978,
supersedes MCL 768.27; MSA 28.1050:

"Other crimes, wrongs, or acts, Evidence of ot
wrongs, or acts is not admissible to prove the character
in order to show that he acted in conformity therewi
however, be admissible for other purposes, such
motive, opportunity, intent, preparation, scheme, pla
in doing an act, knowledge, identity, or absence of mis
dent when the same is material, whether such o
wrongs, or acts are contemporaneous with, or prior or
to the crime charged."

pretending to possess a stolen trailer and pretendi
trailer at Robinson's behest. Therefore, it is cl
evidence was probative not only of defendant's i
his motive and plan as well.

We believe that the trial judge adequately co
aspects of admissibility mandated by *Major* an
cases controlling at the time of trial. See *People* v
Mich App 260; 266 NW2d 781 (1978). Further,
weighed the probative value of the similar acts
found it outweighed its prejudicial effect. S
Oliphant, 399 Mich 472; 250 NW2d 443 (1976)
defendant's argument that the testimony was im
mitted must fail.

Finally, defendant contends he was entrap
Robinson, the police informant, allegedly suppl
the contraband, pressured him and played on the
to involve him in the sale.

Michigan has adopted the objective test for
which focuses solely on police conduct rather th
dividual defendant's predisposition to commit
People v *Turner*, 390 Mich 7; 210 NW2d 336 (
cessful claim of entrapment must be proved b
derance of the evidence. *People* v *D'Angelo*, 40
257 NW2d 655 (1977), and this Court will not
trial court's ruling unless clearly erroneous. *D'A*
183.

The facts gleaned from the pretrial evident
reveal a conflict in testimony. According to tes
FBI agent, defendant had told Robinson he ha
wanted to sell and that he wanted Robinson to
Shortly thereafter, the meeting occurred, the de
and the exchange of money at the warehouse t

Defendant offered a different story, con
unbeknown to the agents, Robinson had stolen
the trailer himself and inveigled the defendar
the sale so he might complete his "deal" with
maintained that Robinson had asked him t
Robinson himself had stolen because th
customers were friends of his and would "bea
price." Further, he contended he neither own
the trailer but that he knew it was stolen.

The trial court, in finding that the police a
constitute entrapment, found specifically th
rather than Robinson, had possession of t
wanted to unload it.

This Court, in *People* v *Stanley*, 68 Mich
NW2d 684 (1976), held that under some circu
police supply contraband which is the basis of
entrapment may be found. If the informant su
traband the same result obtains, as the goverr
ing an informant cannot disown his actions.
564. Reviewing the record, we cannot say t
finding that Robinson did not possess the trail
roneous.

In addition, neither Robinson nor the polic
kind of overzealous approach that would ma
of entrapment. See *People* v *Duis*, 81 Mich
NW2d 794 (1978), *People* v *Asher*, 67 Mich
NW2d 749 (1976).

Although defendant testified he initia
Robinson's offer to sell the trailer, he obliged,
mission, after only one or two demands. W
sympathy and exploitation of long-term frien
constitute entrapment, *People* v *Soper*, 57 Mic

NW2d 691 (1975), we believe, on balance, th
friend for assistance in order to increase a pr
so reprehensible as to require a finding of e

Reversed and remanded for proceeding
this opinion.

E.A. Quinnell, J., concurred.

Bashara, P.J. (dissenting). I respectfully
majority holding that *People* v *Beavers*, 39
NW2d 511 (1975), should be extended to in
recording rather than the more limited par
ing upon which *Beavers* was based.

As to the cases cited by the majority from
peals, namely, *People* v *Taylor*, 93 Mich Ap
210 (1979), *People* v *Perry*, 91 Mich App 7
(1979), and *People* v *Hall*, 88 Mich App 32
(1979), I decline to follow their reasoning.
rely on the reasoning of Judge Danhof's d
Hall, supra, and *People* v *Dubose*, 91 Mi
NW2d 644 (1977).

People v *Beavers, supra*, relied on the dis
Mr. Justice Harlan in the plurality decision
White, 401 US 745; 91 S Ct 1122; 28 L
Parenthetically, I feel that the *Beavers* C
Justice Harlan's opinion was misplaced.
make clear that there is a significant distin
defendant's assumption of risk that a parti
sation may later repeat it, verbally or via a
simultaneous monitoring of a conversation
ple who are not a party to the conversatio

Beavers was a participant monitoring
upon the proposition that only those who

conversation can hear and repeat it. T
distinguished from the case at bar where
not simultaneously transmitted to third
testified to the conversation. See *Lopez* v
US 427; 83 S Ct 1381; 10 L Ed 2d 462 (1
Drielick, 400 Mich 559; 255 NW2d 619 (1
US 1047; 98 S Ct. 893; 54 L Ed 2d 798 (1

Based upon the foregoing, I would affir
viction.

APPENDIX B

AT A SESSION OF THE COURT OF AP
OF MICHIGAN. Held at the Court of
Detroit, on the seventh day of Novem
Lord one thousand nine hundred and

Present the

GEORGE N.
Presiding

DOROTHY
EDWARD A.
Judges

PEOPLE OF THE STATE OF MICHIG
Plaintiff-Appellee,

D
L.

v

ALFRED PETER ARTUSO,
Defendant-Appellant.

In this cause, an application for
plaintiff-appellee, and a motion for lea
is filed by the United States on behal
and an answer in opposition thereto
defendant-appellant, and due consid
been had by the Court,

IT IS ORDERED that the applicatio
the same is hereby DENIED.

IT IS FURTHER ORDERED that th
amicus curiae be, and the same is
moot.

Judge Bashara would vote to gran

STATE OF MICHIGAN — ss.

I, Ronald L. Dzierbicki, Clerk of
the State of Michigan, do hereby cert
true and correct copy of an order ent
cause; that I have compared the san
that it is a true transcript therefrom
original order.

IN TESTIMONY WHEREOF, I h
hand and affixed the seal of sai
at Lansing, this 13th day of Nov
our Lord one thousand nine hu

(s) Ronald L Dzierbicki
Clerk

APPENDI

Supreme Cour

April 18 in the year of our Lord o
and eighty one.

Present
MARY
Chie

THOM
G. ME
CHARI
JOHN
CR 32-41 JAMES
(32-41a) BLAIR
Asso

PEOPLE OF THE STATE OF MICH
Plaintiff-Appellant,

v

ALFRED PETER ARTUSO,

Defendant-Appelle

On order of the Court, the m
amicus curiae brief in support of th
leave to appeal is considered, and